





Supreme Court of the United States

October Term, 1942.

GULF REFINING COMPANY,

Appellant Below

Petitioner,

vs.

LOUIS FETSCHAN and CROSS PARK REALTY COMPANY,

Appellees Below

Respondents.

BRIEF

The petitioner states at page 1 of its brief that "the failure of the jury to answer an interrogatory upon the issue of fact, the decision of which is *necessary* to a verdict" is the question presented by its petition. The District Court and the Court of Appeals agreed with us that an answer to the interrogatory was not necessary since the failure to answer it was not inconsistent with or irreconcilable with the general verdict. Rule 49b of Civil Procedure of this Court, makes it clear that the answer of the jury to the interrogatory or its failure to answer, must be *inconsistent* with the general verdict to control it.

There were two issues in the case, namely, damages resulting to the lessee, Fetschan, from the breach of its lease by petitioner herein from January 1934 to August 1938 and the question as to whether said lessee was damaged by levees around petitioner's plant causing the wash-

ing out of fifteen of his cottages during the great flood of January 1937. Counsel for the petitioner have overlooked

McCrate v. Morgan Packing Co., 117 Fed. (2d) 702
Cranston v. Baltimore & Ohio Ry. Co. 109 Fed. (2d) 630

wherein the United States Circuit Court of Appeals point out the effect of "the two issue rule", in stating there is no adjudication in the federal courts on the question as to the effect of failure to answer an interrogatory. Rule 49b is clear. It requires an inconsistency between a general verdict and an interrogatory for the latter to control the former. In the case at bar the jury answered an interrogatory finding petitioner had breached its lease from January 1934 to August 1938 (petition herein page 4.) This was consistent with the general verdict and labeled the issue on which the jury found. By failing to answer various interrogatories as to flood damage the jury made it clear they could not agree and find on this issue. The respondent, Louis Fetschan, by moving for judgment waived his right to a finding on this issue. The jury voted 11 "yes" to 1 "no", as to one interrogatory wherein they were asked if petitioner's levees caused flood waters to be diverted onto respondent's property during the flood mentioned.

Counsel for petitioner have the burden of showing wherein the failure of the jury to answer the one interrogatory (K) was inconsistent with the general verdict. This they have avoided and begged the question.

If it be considered that the question is one of substantive law and not of procedure and that the law of Ohio and not Rule 49b governs, then we say the law of Ohio is not different.

Pendergast v. Ginsberg, 119 Ohio St. 360, wherein the Supreme Court of Ohio stated that unless special findings, when considered together, are inconsistent and irreconcilable with the general verdict they do not control it.

THE CIRCUIT COURT OF APPEALS OPINION

At once counsel for the petitioner forgot that it is their task to show that the jury found there was flood damage and not damage for breach of the lease in respect to odors, noises, dirty air and the like, in order to talk about the jury's failure to answer the interrogatory being inconsistent with the general verdict. The Circuit Court of Appeals found (Appendix Petitioner's Brief, pages 18 to 21) that it was "obvious that the jury based its verdict on loss of rentals resulting from fumes, odors, and noises attendant upon the operation of the Appellant's refinery for the period between January 1934 and August 1938". All that the Court really needed to find was that the jury *could consistently* so find. We agree that it is obvious that the jury did so find. The Court then points out that the jury have found the covenants of the lease had been broken for the period last mentioned and respondent, Fetschan, had been damaged thereby \$7,908.00 and that it was "unnecessary to answer the special interrogatory asking what damages were allowed on the issue of the smoke, fumes, odors and noise."

Not only was this interrogatory answered by the general verdict, as was stated by the Court of Appeals above, but if it had not been so answered it would not be inconsistent with the general verdict for several reasons. One of these reasons was that the interrogatory did not contain all elements of damage involved in the breach of the lease, as found by the jury, for years 1934 to 1938 such as to the

road, menace of the levees and the like which the jury might have been unable to separate and fix in amounts, as elements of damage, although agreeing on the sum total of loss of rentals and respondent's damage. The jury might well have disagreed as to what factor noises were in driving respondent's tenants from his property or what odors had to do with it, while having no difficulty in finding that the sum total of petitioner's acts caused respondent's loss and the amount thereof.

Under the Rule 49b the failure to answer the interrogatory must be shown to be inconsistent with the general verdict, the same as an answer thereto (if made) to be inconsistent. Lack of an answer cannot be more of a factor than an answer. As long as the interrogatory has been answered by the general verdict or it appears consistent for a jury to fail to answer it and to render a general verdict it does not control the general verdict. The petitioner has the task of showing that the general verdict could not be properly arrived at until after this interrogatory was answered. The interrogatory contained several elements of damage, and left out others, hence the jury (if they considered it as not answered by the general verdict) might have been unable to answer it for that reason. Really the interrogatory should not have been submitted to the jury at all for that reason. The petitioner might just as well have asked the jury what was the sum Fettschan was damaged from odors alone, and in another interrogatory what was his damage from noise and in still a third interrogatory, what was his damage from dirt. The jury might very consistently have found it impossible to separate these three elements of damage while having no trouble in finding the three together produced a sum total of loss of rentals. The jury would have been compelled to guess in order to give a sum for only certain

factors of damage, when the evidence did not separate the damage caused by each element and others.

We submit there is nothing new or novel involved before the Court in this cause. This is an ordinary contract action in which damages are sought for the breach of the terms of a lease. The failure of a jury to answer an interrogatory, found not to control the general verdict by the District Court and the Court of Appeals, can hardly be stretched into a case involving the constitutional right to trial by jury in the Federal Courts. Certainly the court is not going to say that all interrogatories propounded to a jury must be answered whether they control the general verdict or not; that such interrogatories must be answered whether the failure to answer them is consistent with the general verdict or not; that they must be answered although answered by the general verdict.

Respectfully submitted,

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LOUIS FETSCHAN.